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Date: 07/29/2019

Rochester City School District
Board of Education of the Rochester City School District

Time: 4:15:22 PM

City of Rochester
Lovely A. Warren as Mayor of the City of Rochester
Council of the City of Rochester
Monroe County Board of Elections

Total Fees Paid: $0.00

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State of New York

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ADAM J BELLO

MONROE COUNTY CLERK

SUPREME COURT
COUNTY OF MONROE STATE OF NEW YORK

ROCHESTER SCHOOL DISTRICT, and the BOARD OF EDUCATION OFF THE ROCHESTER CITY SCHOOL DISTRICT,

Petitioners,

-vs-

CITY OF ROCHESTER, LOVELY A. WARREN, as Mayor of the City of Rochester, COUNCIL OF THE CITY OF ROCHESTER, and the MONROE COUNTY BOARD OF ELECTIONS,

Respondents.

MEMORANDUM OF LAW

Index No. E2019007046

PRELIMINARY STATEMENT

On November 5, 2019, the people of the City of Rochester will have the opportunity to vote to amend the City Charter to clear the way for the State Legislature, the Department of Education and Board of Regents to take bold action to reform the long-failing Rochester City School District by temporarily removing the current Board of Education and replacing it with an appointed excellence task force committed to a renewed focus on student achievement and wellbeing. Yet with this lawsuit, the Board of Education tries to take that vote away from the people, placing the Board Commissioners' individual interests in keeping their positions and salaries above the concerns for the education and welfare of our City's children. Even assuming that the Board and the District have standing to bring this suit, their attempt to stymie the people's choice necessarily fails, as the Municipal Home Rule Law mandates a referendum where, as here, a Charter amendment would result in the abolishment of elective offices of the City, alter the method for removing elective officers, or reduce the salaries of elective officers.

STATEMENT OF FACTS

The following facts are all taken from the Affirmation of Patrick Beath. The City of Rochester has had a public school system ever since the State Legislature passed the 1907 Rochester City Charter (*see* Session Laws of New York 1907, Chpt. 755, §§ 14, 17, 21, 381-405). The 1907 Charter provided for a "Department of Public Instruction" which was to provide a free education to the youth of the City (*id.* at §§ 381-405). In furtherance of this goal, the 1907 Charter also created elective offices of Commissioners of Schools comprising the Board of Education, which acted as the head of the Department of Public Instruction (*id.* §§ 14, 17). The 1907 Charter specified annual salaries to be paid to the Commissioners (*id.* § 21).

Much of this framework changed in 1917 when the State Education Law was amended such that the Boards of Education "in each City of the State" were to comport with and be controlled by State, not local, law. *See* Session Laws of New York 1917, Chpt. 786. The 1917 law explicitly repealed sections 381 through 404 of the City's original 1907 Charter, which sections established the Department of Public Instruction. However, the 1917 law left undisturbed those portions of the 1907 City Charter that established the Commissioners of Schools as elective officers of the City and that set the salary for these Commissioners. Accordingly, even today, the City Charter and the State Education Law each independently (and harmoniously) provide that the members of the Board of Education for the RCSD are to be elected by the electors of the City of Rochester and serve terms of four years. *Compare* Rochester City Charter §§ 2-1 and 2-8 (annexed hereto as Exhibit E) with Education Law § 2553.

As to board member salaries, State law does not provide for the payment of compensation to Board members—rather, since 1907, salaries for School Board members have been authorized solely by Rochester City Charter. The Charter originally authorized salaries in

the amount of $1,200 per year. That amount was revised a number of times until the Charter was amended in 1979 to allow the members of the School Board to fix their own salaries, which the board has done since that time. Presently, the RCSD School Board Commissioners are the highest paid in the State, with the Board President earning $34,758 annually and the other six Commissioners earning $27,033 each, for a total annual compensation of $196,956. *See* David Andreatta, *Andreatta: Why are Rochester School Board members highest paid in state?,* annexed to the Beath Affirmation as Exhibit A.

Despite Board members' decision to make themselves the highest paid School Commissioners in the State, the "Rochester City School District is a system that has historically underperformed" and is "in dire need of improvement" to quote from the recent report of Distinguished Educator Jaime Aquino, a copy of which is annexed to the Beath Affirmation as Exhibit B. Recognizing that a significant change needs to be made to the governance of the Rochester City School District in order to improve both student achievement, State Education Commissioner MaryEllen Elia and State Board of Regents members T. Andrew Brown and Wade Norwood have outlined a Plan to temporarily remove the elected members of the Board of Education and replace them with a five-member "excellence tax force" appointed by the Regents to serve for a limited period of time. This Plan has been formalized in legislation proposed in the New York State Assembly dated July 10, 2019, which is annexed to the Beath Affirmation as Exhibit C.

In order to ensure that there are no legal obstacles to implementation of this Plan at the local level, the City of Rochester has passed and adopted Local Law No. 4 of 2019, a copy of which is annexed to the Beath Affirmation as Exhibit D. Local Law No. 4 seeks to amend the Rochester City Charter to remove any reference to "Commissioners of Schools" as elective offices of the City of Rochester. This amendment is necessary to ensure that local law and State

law are not in conflict should the State implement the Plan. Specifically, if the State legislature were to amend the Education Law to allow for the removal of the current RCSD School Board and the temporary appointment of an excellence task force, such appointment would conflict with the Charter's requirement that the Commissioners of Schools be elected by City voters, serve four-year terms and be paid therefor. Thus, in order to be prepared for as smooth a transition as possible should the State Plan be implemented, the City has taken steps to remove from the Charter any reference to the Commissioners of Schools as elective officers of the City.

In the normal course, a Local Law amending the Charter may be passed by action of the City Council and the Mayor alone. Here, however, a referendum is required by the Municipal Home Rule law before the Charter Amendment may take place. The Municipal Home Rule Law requires a referendum for any local law that "abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective office, or reduces the salary of an elective officer during his term in office." By removing Commissioners of Schools as an elective office of the City of Rochester, the legislation here at issue "abolishes an elective office" and by eliminating any provision for the payment of salaries, the legislation "reduces the salary of an elective officer during his term in office." As such, this law must be submitted to the voters at a referendum.

As the foregoing makes clear, the legislation at issue, the referendum procedure, and the factual and historical context in which the legislation arises are complex. It is incumbent upon City leaders to educate the public about the referendum and the issues implicated therein prior to the November vote. In an effort inform and educate the public, Mayor Warren has made statements to the press and has sent correspondence to voters apprising them of the issues and encouraging them to vote.

At no time has Mayor Warren or any other City official urged a vote for or against the Charter amendment.

ARGUMENT

I. The Referendum is Mandatory and Not Advisory

For 112 years, the Rochester City Charter has provided that Commissioners of Schools are elective officers of the City and has authorized payment of salaries for these Commissioners and defined their terms in office. The establishment of these elective offices in the original 1907 Rochester City Charter predated State control of local Boards of Education by 10 years. Even when the State Education Law was amended in 1917 and those portions of the City Charter establishing a Department of Public Instruction were repealed, still the Charter preserved the Commissioners of Schools as elective officers paid pursuant to Charter.

Local Law No. 4 now seeks to amend the City Charter to remove any mention of the Commissioners of Schools as elective City offices. But a Charter amendment that abolishes any elective City office or reduces (or eliminates) the salaries of any elected officer must be placed before the voters by referendum pursuant to Section 23 of the Municipal Home Rule Law.

Simply stated, the referendum is not advisory and is in fact mandated by State law due to the substantive changes that Local Law No. 4 makes to the City Charter. But petitioners close their eyes to the actual language of the Local Law and, instead, recite over and over again their mystical mantra: advisory referendum. None of the cases cited by petitioners bears out their claims that the upcoming referendum is merely advisory.

Petitioners rely primarily on *Astwood v. Cohen*, 291 NY 484 [1943], to argue that Local Law No. 4 "is not in truth and in fact a real amendment to the city charter" (petitioners' memo of law at pg. 3). Yet even cursory review shows that Local Law No. 4 proposes to make "real" and

"true" changes to the City Charter by abolishing Commissioners of Schools as elective officers and eliminating their salaries (thereby saving tax payers some $196,000 annually).[1]

In any case, the referendum at issue in *Astwood* was starkly different than here. In *Astwood*, electors of the City of New York attempted to take advantage of a provision of the City Home Rule Law that allowed passage of Local Laws amending the City Charter upon petition of the electors where City Council had previously failed to pass the law directly. The *Astwood* petitioners sought to amend the City Charter to provide for a salary bonus to be paid to each City police officer and firefighter. The *Astwood* Court blocked the referendum, holding that the proposed Local Law would not effect a true Charter amendment. Rather, the *Astwood* Court found that "[g]ranting a salary bonus to city employees is quite unrelated to any provision of the New York City Charter and the grant proposed in no sense alters or changes any provision contained in the Charter" (291 NY at 489). The Court held that the proposed Charter amendment was in actuality an alteration of the City's Administrative Code, which, unlike the Charter, could not be amended by petition and referendum.

Unlike the in-name-only Charter amendment in *Astwood* that was "quite unrelated to any provision of the New York City Charter," here, Local Law No. 4 explicitly alters terms of the Rochester City Charter concerning elective offices, thereby requiring a mandatory referendum under the Municipal Home Rule Law. *Astwood* underscores the propriety of the City's actions.

None of the other cases cited by petitioners fare any better. *Mills v. Sweeney*, 219 NY 213 [1916] stands for the proposition that legislation may be passed by referendum only where there

[1] As set forth in greater detail in Point II, *infra*, if petitioners were correct that Local Law No. 4 calls for a purely advisory referendum that would have "no legal consequence," then, *ipso facto*, petitioners would be unable to show any actual injury and, thus, would have no standing to maintain this suit.

is specific authorization for the referendum under state law. Here, the Municipal Home Rule Law requires that Local Law No. 4 be submitted to the electors of the City, thereby satisfying the concerns in *Mills*. *Kupferman v. Katz*, 19 AD2d 824 [1st Dept. 1963], includes dicta concerning advisory referenda, reports that "most of the court believe that the instant referendum could not survive analysis that it is an advisory, and, therefore, unauthorized referendum" but then goes on to allow the referendum to proceed because the challengers delayed too long in bringing their challenge—*Kupferman*'s contradictory ruling hardly provides any guidance here. Similarly, *Woodburn v. Village of Owego*, 151 AD3d 1216 [3d Dept. 2017], dealt not with a referendum, but with an opinion survey being circulated by the Village of Owego, which was upheld by the Court. Any discussion of referenda is dicta.

Petitioners also suggest that the referendum should fail because it "conflicts with authority granted to the State or Federal Government." But, again, neither the facts nor the law are on their side. Each of the cases that petitioners cite involves proposed Charter amendments that conflicted with national military law or policy (*see Fossella v. Dinkins*, 130 Misc2d 52 [Richmond Cty Sup 1985][petition seeking referendum to amend New York City Charter to prevent the City from selling or leasing property for federal military purposes]; *Silberman v. Katz*, 54 Misc2d 956 [NY Cty Sup 1967][petition to amend New York City Charter to establish municipal office known as the "Anti-Vietnam War Coordinator"]; *Brucia v. County of Suffolk,* 90 AD2d 762 [2d Dept 1982][allowing advisory referendum concerning "deployment of nuclear weapons" to proceed to vote due to lateness of challenge]). Here, the Charter amendments would not create any conflict with State or federal law. In fact, it is in an attempt to avoid any such conflict that the City realized the Charter amendment was necessary. Presently, both City and State law are consistent in that they provide for an RCSD school board composed of seven members, each serving four-year terms, and elected by the electors of the City of Rochester. If State law changes, however, to

remove the elected Board members and appoint an excellence task force, then the City Charter and amended State law will be at odds. As such, any member of the Rochester community discontent with the changes at the State level could argue that election of Commissioners of Schools has long been a matter of local concern governed by the City since the 1907 Charter. This could result in protracted litigation over whether the City Charter or State Education Law controls, which could only slow much needed reforms. Accordingly, to get ahead of this issue, the City is amending the Charter so that these provisions will not stand in the way of reform on the State level.[2]

Thus, petitioners have it backwards when they argue in the penultimate paragraph of page 4 of their memo that "the passage of the Local Law depends not only on whether the majority of voters approve the proposition, but on the State enacting the 'appropriate enabling amendments to the Education Law.'" Passage of the Local Law will make State action more efficient, but it is not contingent upon State action and does not rely on State action to take effect. Rather, the City is making these changes to the Charter now (rather than, for instance, ten years ago or ten years hence) because it anticipates State action that has implications for the interaction of State law and these provisions of the City Charter.

In sum, the referendum to pass Local Law No. 4 and amend the Charter is far from advisory: it will work substantive changes to long-standing Charter provisions, which changes are necessary for the State to proceed meaningfully and efficiently with its Plan to improve the Rochester City School District.

[2] It should be noted that, because City and State law are currently in harmony concerning election of School Commissioners and the terms therefor, if the referendum passes and the City Charter is amended but there is no subsequent action taken at the state level, the *status quo* will not be upset because the State Education Law will continue to provide for elections as normal.

II. If the Referendum Were Advisory, Neither the School District Nor the School Board Would Have Standing to Bring A Challenge

A great irony of petitioners' position in this matter is that they have standing only if Local Law No. 4 and the planned referendum would work a substantive change to the law thereby exposing them to some harm (like a loss of salaries). If, as petitioners argue, the referendum is purely advisory, then they risk no injury and do not have standing to maintain this suit.

"Under the common law, there is little doubt that a 'court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected'" (*Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991][quoting *Schieffelin v Komfort*, 212 NY 520, 530 [1914]]). "Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" (*Matter of Assn. for a Better Long Is., Inc. v NY State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]).

Petitioners' theory of liability does not cause them any injury in fact. Indeed, petitioners set forth the crux of their argument in the second sentence of the second full paragraph on page 4 of their memorandum: "The referendum would put a public poll on a ballot, which, if approved, would have no legal effect or consequences." Yet a referendum that has "no legal effect or consequences" cannot cause petitioners any injury-in-fact.

Many of the cases cited by petitioners that challenge advisory referenda are brought by taxpayers on a theory that the taxpayer is injured by the City's expenditure of tax monies to place an advisory referendum on the ballot[3] (*see, e.g., Mills v. Sweeney,* 219 NY at 214; *Woodburn v. Village of Owego*, 151 AD3d at 1217-1218; *Stern v. Kramarsky*, 84 Misc2d 447 [NY Cty Sup

[3] Of course, it is perfectly legal to use public monies to put a mandatory referendum like Local Law No. 4 on the ballot.

1975]). But petitioners here cannot use that route to obtain standing for the self-evident reason that neither pays taxes.

In short, if petitioners can demonstrate that the referendum on Local Law No. 4 would cause them an injury-in-fact for standing purposes, this action fails because the referendum is not merely advisory. If, on the other hand, the Court were to find merit in petitioners' argument that the referendum is advisory and that passage of Local Law No. 4 would "have no legal effect or consequences," then petitioners cannot show an injury-in-fact and do not have standing. Either way, petitioners cannot maintain this action.

III. The City Is Allowed To Spend Public Monies to Educate the Public and Promote Voting on This Referendum

Under the New York Constitution, public funds may not be used "to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election" because such would "constitute a subsidization of a nongovernmental entity—a political party, candidate or political cause advanced by some nongovernmental group" *Schultz v. State*, 86 NY2d 225, 234 [1995]. But such funds may be expended "to educate, to inform, to advocate or to promote voting on any issue . . . provided it is not to persuade nor to convey favorism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be" (*id.* at 234-235 [internal quotation omitted]).

Petitioners conclusorily assert that "the City and the Mayor have spent at least $10,000 of public funds for what appears to be advocacy for and promotion of the Local Law and Referendum. The City has produced a video, and has issued news releases." Petitioners fail to articulate in any measure what about the City's public statements concerning the Local Law and Referendum have the "appearance" of advocacy and promotion. That's because they can't: none of the City's statements concerning Local Law No. 4 and the referendum are "designed to exhort the electorate

to cast their ballots in support of a particular position" (*Phillips v. Maurer*, 67 NY2d 672, 674 [1986]).

A review of the July 12, 2019 Letter from Mayor Warren, appended to the Moyer Affirmation as Exhibit F, demonstrates that the City has provided facts to educate potential voters and has advocated, if for anything, only for voters to come to the polls and vote in November. The first two paragraphs of the letter recite specific facts: the District's long history of being "broken" and failing the City's children. These facts are consistent with the Distinguished Educator's report, also cited in the first paragraph. The third paragraph informs the electorate of City Council's passage of Local Law No. 4 and the upcoming referendum. The fourth paragraph provides additional facts concerning the long history of failure of the RCSD Board of Education, including statistical information concerning test scores and graduation rates. Paragraph five relates what members of the community have shared with the Mayor concerning the RCSD. The sixth paragraph again informs the reader of the upcoming referendum vote and conveys the Board's historic inability to maintain a steady Superintendent and other high-level administrative staff. The seventh paragraph explains the goals of temporary state leadership of the RCSD, implementation of which will be fostered by the passage of Local Law 4. The final two paragraphs of the letter ask readers to come out to the polls and vote with the aim of "building stronger children together." The letter exhorts readers to vote; it does not tell them how to vote.

The City's use of funds to educate the public and encourage the public to vote in November is entirely proper.

IV. The Court Should Not Issue a Preliminary or Permanent Injunction

Petitioners are not entitled to a preliminary or permanent injunction, because they cannot show a likelihood of success on the merits or irreparable injury, and the equities balance in favor of the City (*Doe v Axelrod*, 73 NY2d 748, 750-751 [1988]).

As set forth above, even if petitioners could show a likelihood of success on the merits (i.e. demonstrate that the referendum is advisory), they would not have standing to sue. Alternatively, if petitioners are able to show that the referendum would cause them an injury-in-fact sufficient for standing, they necessarily fail on the merits because the referendum could not be advisory. Far from a likelihood of success, petitioners suit seems guaranteed to fail.

Further, petitioners fail to articulate any injury, let alone an irreparable injury, that would be caused by a referendum on Local Law No. 4.

As to the balance of the equities, if the Court were to enjoin the City and Board of Elections, that could only have the effect of delaying the preparation and printing of ballots. The longer the injunction lasts, the more difficult it will be for the Board of Elections to be able to present the referendum to the electorate on November 5. If the injunction were to last beyond the election, yet the matter ultimately be decided in the City's favor, it would rob the electorate of a vote, potentially delay any State action that might take place to restructure the RCSD Board, and require a special election, thereby increasing the cost to taxpayers. The equities balance strongly in the City's favor.

CONCLUSION

For the foregoing reasons, City Respondents respectfully request that the Court enter judgment in their favor, deny petitioners' applications for preliminary and permanent injunctions, dismiss this suit with prejudice, award City Respondents their costs, fees, and disbursements and grant such additional relief as the Court deems appropriate.

DATED: July 29, 2019

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